BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A VARIANCE PERMIT GRANTED TO HAROLD O. KOOLEY BY PIERCE COUNTY AND DENIED BY THE DEPARTMENT OF ECOLOGY HAROLD AND ELLA KOOLEY and PIERCE COUNTY, Appellants, v. STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY, Respondent.	SHB No. 218 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This matter, the request for review of a denial by the Department of Ecology of a variance granted by Pierce County, was brought before the Shorelines Hearings Board, Chris Smith, Chairman, W. A. Gissberg, Art Brown, Ralph A. Beswick, Robert F. Hintz, and James S. Williams on July 8, 1976, in Lacey, Washington. Hearing Examiner, Ellen D. Peterson, presided.

Appellants Harold and Ella Kooley were represented by Allan R. Billett; appellant Pierce County did not appear; Assistant Attorney General Joseph J. McGoran appeared for respondent, Department of Ecology.

Having heard the testimony, having reviewed Respondent's Hearing Memorandum, and having examined the exhibits, the Shorelines Hearings Board makes the following

FINDINGS OF FACT

I.

On July 18, 1975, appellants filed with Pierce County an application for a substantial development permit with a variance from the Pierce County Shoreline Master Program. The Kooleys' proposed development consisted of a "Pier (47 feet long), ramp (25 feet long), and float (10 x 20 feet) to provide private recreational facilities." The length of the proposed pier, ramp, and float would be 92 feet, or 42 feet beyond the design criterion of maximum length for piers and docks specified in the Pierce County Shoreline Master Program. The proposed 47-foot pier is already partially constructed on the appellants' waterfront property on East Oro Bay, Anderson Island.

The Pierce County Shoreline Technical Advisory Committee, on August 21, 1975, unanimously recommended that the Board of County Commissioners deny the application for the variance, concluding that "the existing pier provides reasonable access to the water for the property owner."

Following a public hearing on February 9, 1976, the Pierce County Commissioners unanimously granted a permit "To construct a 92 foot pier, gangway and float" subject to two conditions: "(1) that the dock

not be used for commercial purposes, and (2) that the dock be as aesthetically compatible as possible with the immediate surroundings." The Commissioners' decision was submitted to the Department of Ecology (DOE) on February 13, 1976, pursuant to RCW 90.58.140(11):

> Any permit for a variance or a conditional use by local government under approved master programs must be submitted to the department for its approval or disapproval.

On March 5, 1976, the Department of Ecology denied the variance by typing on the back of the Pierce County permit the following: "The variance does not meet the provisions of WAC 173-14-150."

Appellants filed their appeal from this denial with the Shorelines Hearings Board on April 5, 1976.

II.

The Shoreline Master Program for Pierce County was approved by the Department of Ecology on April 4, 1975. With regard to the construction of piers and docks, the approved document provides in relevant part:

> D. Piers associated with single family residences should be discouraged.
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> F. Encourage the use of mooring buoys as an alternative to space-consuming piers such as those in front of single family residences. Policies, p. 97.
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> A. Developers of docks for single family residential use, must be able to show that the following alternatives have been investigated and are not a feasible alternative: (1) commercial or marina moorage, (2) floating moorage buoy, (3) joint use moorage pier . . . . General Regulations, p. 98.
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> C. Residential docks on saltwater, when allowed, shall meet the following design criteria:
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> 1. Maximum length shall be fifty (50) feet or only so long as to obtain a depth of eight (8) feet, whichever is less at mean lowest low water.

2. Maximum width shall be six (6) feet. (Emphasis added.) Design Criteria, p. 99.

A.2. Piers and docks shall be permitted subject to the general regulatory standards, and Conditional Use requirements. Environmental Regulation - Uses Permitted, p. 100.

III.

In addressing variances from use regulations established pursuant to the Shoreline Management Act, RCW 90.58.100(5) provides:

> Each master program shall contain provisions to allow for the varying of the application of use regulations of the program, including provisions for permits for conditional uses and variances, to insure that strict implementation of a program will not create unnecessary hardships or thwart the policy enumerated in RCW 90.58.020. Any such varying shall be allowed only if extraordinary circumstances are shown and the public interest suffers no substantial detrimental effect. The concept of this subsection shall be incorporated in the rules adopted by the department relating to the establishment of a permit system as provided in RCW 90.58.140(3).

The referenced RCW 90.58.140(3) provides:

> Local government shall establish a program, consistent with rules adopted by the department, for the administration and enforcement of the permit system provided in this section. . . .

The Department of Ecology regulation pertaining to variances granted under the Shoreline Management Act became effective on January 2, 1976, and provides:

> A variance deals with specific requirements of the master program and its objective is to grant relief when there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the master program. A variance will be granted only after the applicant can demonstrate in addition to satisfying the procedures set forth in WAC 173-14-130 the following:
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> (1) That if he complies with the provisions of the master program, he cannot make any reasonable use of his property. The fact that he might make a greater profit by using his property in a manner contrary to the intent of the program is not a sufficient reason for a variance.
>
> (2) That the hardship results from the application of the

requirements of the act and master programs, and not, for example, from deed restrictions or the applicant's own actions.

(3) That the variance granted will be in harmony with the general purpose and intent of the master program.

(4) That the public welfare and interest will be preserved. WAC 173-14-150.

The Pierce County Master Program adopted the following language as to variances:

> It is understood that the regulations may cause unnecessary hardships in particular situations, or that the regulations might be unreasonable in light of new evidence, technology, or other special circumstances, and the goals and policies of the Master Program may not necessarily be served by the strict application of the regulations. The property owner must show that if he complies with the provisions he cannot make any reasonable use of his property. The fact that he might make a greater profit by using his property in a manner contrary to the intent of the program is not a sufficient reason for a Variance.
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> A Variance will be granted only after the applicant can demonstrate the following:
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> A. There are conditions or circumstances involved with the particular project that make strict application of the regulations unnecessary or unreasonable for the applicants proposal.
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> B. That granting the Variance will not violate, abrogate, or ignore the goals, policies, or individual environment purposes spelled out in the Master Program.
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> C. That no other applicable regulations will be violated, abrogated, or ignored.
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> D. That the public health, safety and welfare will not be adversely affected.
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> E. That the specific provision or provisions to be relaxed clearly did not foresee or consider the particular situation the applicant is facing. Variances, p. 133.

IV.

Mr. and Mrs. Kooley, the applicants for the variance in this matter, purchased the subject beach lot in 1950 and have used it as a

second home site since that date. It is located in an environment designated "Rural" under the Pierce County Master Program.

The Kooley property for purposes of applying the variance standards imposed by WAC 173-14-150 was stipulated by the parties to this request for review as being that property on East Oro Bay, Anderson Island, which is:

> The east 75 feet of Lot 1 of Section 9, Township 19 north, Range 1 east of the Willamette meridian, lying south of the county road,[1] together with the second class tidelands abutting the above 75 feet of property.

The waterfront of the Kooley property is shallow water with a long run-out, a beach configuration which is shared by most of the property owners on East Oro Bay. Such topography is not unique to Mr. Kooley or East Oro Bay but exists elsewhere on Anderson Island and throughout Pierce County.

The distance from the Kooleys' existing bulkhead to mean lowest low water is 300 feet. A pier, ramp, and float conforming to the design criterion maximum of 50 feet would restrict water access to the property during most low tide conditions.

With construction of the project, as requested, the applicant would have access to the docking float an additional six hours a day, or three additional hours with each tide change.

A Department of Ecology official testified that, given the topography of the Bay and its resultant access limitations, appellants' request was "reasonable." He further testified that waterfront land area

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1. It is approximately four hundred feet from East Oro Bay to the parallel county road.

having long and shallow run-outs should have been specifically addressed in the Pierce County Master Program.

The Kooleys consider an extended dock essential to their use and enjoyment of the property because their advancing age as well as Mrs. Kooley's heart difficulties preclude the use of a buoy and small dinghy as a practical access alternative.

V.

Anderson Island, on which the subject property is located, is serviced by a ferry which can accommodate approximately 19 cars and has eight daily trips scheduled. A larger ferry has been purchased but is not yet in service. The development of Riviera Estates,[2] two miles to the north of the applicants' property, has and will continue to place heavy demands on the ferry service.

Emergency service to and from the island is dependent upon the regular ferry schedule, the few existing private piers, army helicopters, and buoyed private boats.

At the present time, private piers such as that contemplated by Mr. Kooley exist on Anderson Island on only three sites. None of these piers is located on East Oro Bay and all were in place prior to the enactment of the Shoreline Management Act.

VI.

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Shorelines Hearings Board comes to these

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2. The Riviera development encompasses 1,300 of Anderson Island's 5,000 acres; 3,500 lots have been platted.

CONCLUSIONS OF LAW

I.

In exercising its judgment with regard to the granting or denial of a request for a variance, the Pierce County Board of Commissioners was subject to the variance standards established by the Shoreline Management Act, the Department of Ecology regulation, and the Pierce County Master Program as detailed in Findings of Fact III. These, then, are the standards which the Board must apply in determining the validity of the variance.

II.

The DOE rule dealing with variances is found in WAC 173-14-150. It states that the objective of the rule "is to grant relief when there are practical difficulties or unnecessary hardship" in carrying out the master program.

Many courts have held that the requirement of "practical difficulty" is a less restrictive standard than that of "unnecessary hardship."[3] The DOE rule, since it is stated in the alternative, "or," appears to begin to follow the common scheme of establishing two distinct standards of proof. Unnecessary hardship has traditionally been construed as requiring the applicant for a variance to show the equivalent of a taking in the constitutional sense, while "practical difficulty" is a requirement less stringent than "unnecessary hardship."

The practical difficulty standard, courts seem to hold, can be

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3. Anderson, American Law Zoning, § 14.46, et seq.

met without proof that a literal application of the zoning regulations would deny the applicant all beneficial or reasonable use of his land. The courts of many states, through their case results or reasons, hold not only that "practical difficulties" and "unnecessary hardship" are distinct variance standards, but that each standard is applied to test a different and particular type of variance.[4] The unnecessary hardship test is applied to a use variance, while the practical hardship test is applied to an area variance. It thus appears that variances are of two types, "use" and "area."

A "use variance" authorizes a use of land which otherwise is proscribed by the zoning regulation in which it is located. An "area variance" authorizes deviation from restrictions upon the construction and placement of structures which serve permitted uses.[5]

The DOE variance rule, after stating that its objective is to grant relief on either a showing of difficulty or hardship, in the next sentence adopts the more stringent hardship standard for all variances by requiring that the property owner prove that without the variance he cannot make any reasonable use of his property.

Ordinarily, zoning statutes authorizing a variance in cases of unnecessary hardship "do not define that phrase, but leave its

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4. Anderson, American Law Zoning, § 14.47.

5. Anderson, American Law Zoning, § 14.47; 82 Am. Jur. 2d § 256.

application in each instance to the proper authorities."[6] The variance standards of the Shoreline Management Act, found in RCW 90.58.100(5), do not attempt to define the meaning of "unnecessary hardship:"

> Each master program shall contain provisions to allow for the varying of the application of use regulations of the program, including provisions for permits for conditional uses and variances, to insure that strict implementation of a program will not create unnecessary hardships or thwart the policy enumerated in RCW 90.58.020. Any such varying shall be allowed only if extraordinary circumstances are shown and the public interest suffers no substantial detrimental effect. The concept of this subsection shall be incorporated in the rules adopted by the department relating to the establishment of a permit system as provided in RCW 90.58.140(3).

The foregoing statute seems to contemplate variances of "use" regulations as well as other "variances."

The DOE has, however, apparently and perhaps overrestrictively defined the phrase to be applicable to all types of variances, use and area alike:

> . . . A variance will be granted only after the applicant can demonstrate . . . the following:
> (1) That if he complies with the provisions of the master program, he cannot make any reasonable use of his property . . . .[7] (Emphasis added.)

In summary, although the Shoreline Act itself allows greater flexibility in the granting of variances of certain types, the DOE has chosen not to follow that acceptable pattern and thereby for all practicable purposes has effectively denied utilization of area variances in situations where such varying would be

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6. 82 Am. Jur. 2d § 272.

7. WAC 173-14-150(1).

consistent with all of the provisions of the statute.

III.

Appellants' variance must be denied because under the facts of this case they cannot demonstrate that if they comply with the provisions of the master program they cannot make any reasonable use of their property. Stated in another fashion, to deny appellants' request for an extension of their dock will not deprive them of other reasonable uses of their property. Additionally, appellants have failed to show that there are any extraordinary circumstances which are unique or peculiar to their property as distinguished from circumstances which are shared by neighboring landowners. As stated in Finding of Fact IV, a long shallow tidal run-out is common in the area and appellant and others similarly situated must seek relief by virtue of that circumstance through an amendment of the master program itself. That can only be accomplished by the county legislative body with the approval of the Department of Ecology.

IV.

Under the DOE regulations it can properly deny a variance for any one of several grounds. In future denial actions, it would be helpful to the Board and other interested parties if the Department will articulate in its Order the specific ground or grounds upon which its decision is based.

V.

Any Finding of Fact which should be deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions, the Shorelines Hearings Board makes and enters its

ORDER

The action of the Department of Ecology denying the variance granted by Pierce County to Harold and Ella Kooley is affirmed.

DATED this 9th day of August, 1976.

SHORELINES HEARINGS BOARD

CHRIS SMITH, Chairman

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RALPH A. BESWICK, Member

ART BROWN, Member

W. A. GISSBERG, Member

ROBERT F. HINTZ, Member

JAMES S. WILLIAMS, Member